

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

FRANK GLOVER

Plaintiff,

Case No. 1:07- cv-648

Hon: Judge Robert Holmes Bell

vs

MARY JANE M. ELLIOTT P.C.

Defendants

WARNER LAW FIRM LLC
Curtis C. Warner P59915
Attorney for Plaintiffs
151 N. Michigan Ave. 37th Floor -3714
Chicago, IL 60601
312-238-9820

MARY JANE M. ELLIOTT PC
Mary Jane M. Elliott P32732
Attorneys for Defendant
24300 Karim Blvd.
Novi, MI 48375
248-306-2000

DEFENDANT MARY JANE M. ELLIOTT PC'S RESPONSE
TO PLAINTIFF'S MOTION TO STRIKE UNDER RULE 12(f)

NOW COMES Defendant Mary Jane M. Elliott PC and for it's Response to Plaintiff's Motion to Strike, states as follows:

1. No response is required of Defendant to this paragraph as it simple restates the Court Rule.
2. Defendant denies the allegation contained in paragraph 2 because it is untrue and incorrect as more fully set forth in the attached Brief in Support of Response to Plaintiff's Motion.

3. Defendant denies the allegation contained in paragraph 3 because it is untrue and incorrect as more fully set forth in the attached Brief in Support of Response to Plaintiff's Motion.

4. Defendant denies the allegations contained in paragraph 4. For reasons for fully set forth in the attached Brief, Defendant denies that striking any pleading of Defendant is proper or warranted under the applicable Court Rules or case law.

5. Defendant admits filing it's proper and timely Answer to Complaint in this matter. For reasons for fully set forth in the attached Brief, Defendant denies that striking any pleading of Defendant is proper or warranted under the applicable Court Rules or case law.

6. Defendant admits that Plaintiff has attached a memorandum. For reasons for fully set forth in the attached Brief, Defendant denies that striking any pleading of Defendant is proper or warranted under the applicable Court Rules or case law.

WHEREFORE, Defendant Mary Jane M. Elliott PC respectfully requests that this Honorable Court dismiss the Motion, and award costs and attorneys fees so wrongfully incurred in defense of this frivolous action.

Respectfully submitted,

s/Daniel Manion
Mary Jane M. Elliott PC
Daniel Manion P49904
24300 Karim Blvd.
Novi, MI 48375
(248) 306-2000

Dated: September 21, 2007

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

FRANK GLOVER

Plaintiff,

Case No. 1:07- cv-648

Hon: Judge Robert Holmes Bell

VS

MARY JANE M. ELLIOTT P.C.

Defendants

WARNER LAW FIRM LLC
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151 N. Michigan Ave. 37th Floor -3714
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248-306-2000

**DEFENDANT MARY JANE M. ELLIOTT PC'S BRIEF IN SUPPORT OF
RESPONSE TO PLAINTIFF'S MOTION TO STRIKE UNDER RULE 12(f)**

NOW COMES Defendant Mary Jane M. Elliott PC and for it's Brief in Support of Response to Plaintiff's Motion to Strike, states as follows:

FACTS

The Plaintiff has filed his claim under the Fair Debt Collection Practices Act (hereinafter "FDCPA") alleging that the "OFFER TO SETTLE" letter (attached hereto as Exhibit #1) is false and misleading and threatens legal action that cannot be taken - thereby violating various subsections of 15

USC §1692e and Michigan statutory provisions. Defendant has filed a substantive Answer to Complaint under the liberalized pleadings standards in the federal system. Defendant's pleading comports with Rule 8(b) which requires the responding party to state the party's defenses to each claim asserted. Further, Defendant's pleading comports with the requirements and the spirit of the Federal Rules, including Rule 8(c) which requires a party to set forth, affirmatively, any matter constituting an avoidance or affirmative defense. As discussed below, Defendant's Answer and Affirmative Defenses articulate actionable defenses to the claims contained in the Complaint of the Plaintiffs, and Plaintiff's attempt to have the defenses "stricken" without proper authority for the proposition, is frivolous and dismissal of the motion is warranted.

ANALYSIS/LEGAL ARGUMENT

1. Motion to Strike Standard

In general, the Motion to Strike is disfavored. Typically such motions are only granted when the allegations attacked have no possible relation to the controversy. *Skolnick v Hallett*, 350 F.2d 861 (7th Cir. 1965). Such a motion should be considered carefully and not freely granted. *Kelley v Thomas Solvent Co.*, 714 F. Supp. 1439, 1442 (1989). It is a drastic remedy to be resorted to only when required for the purposes of justice. *Brown & Williamson Tobacco Corp. v United States*, 201 F.2d 819, 822 (1953). Partly because of the practical difficulty of deciding cases without a

factual record it is well established that the action of striking a pleading should be sparingly used by the Courts. *Id.* In this matter, there has been no factual record established whatsoever. Plaintiff's Motion is requiring the Court to decide factual issues on the merits of various defenses without any factual record.

2. Defendant has Properly Pled Defenses

Defendant's pleadings relate to the controversy. First, numerous affirmative defenses raised by Defendant are required to be raised in a responsive pleading pursuant to Rule 8(c). (See Defendant's Affirmative Defenses, #2, 4, 5, 10). Plaintiff now demands that the Court strike these pleadings pursuant to Rule 12(f) as being insufficient as a matter of law *without any factual record* - other than those facts offered by Plaintiff's counsel.

For example, regarding Affirmative Defense #5, waiver, Plaintiff argues that the defense should be struck because Defendant hasn't done any investigation into the law and facts supporting its affirmative defenses. (See Plaintiff's Motion, p. 6-9.). Plaintiff further believes that affirmative defenses #9, 14 and 15 (limitations, res judicata, any estoppel issues) should also be struck based on this reasoning. Plaintiff offers no supporting authority for this proposition and it is not a proper reason for striking defenses of a party. The point and purpose of Rule 8(c) is to provide notice of any "matter constituting an avoidance or affirmative defense".

A party is required to file responsive pleadings within 20 days of service of the Complaint. Apparently, Plaintiff's faulty logic is that a responding party must have its case "trial-ready" within those 20 days. While Defendant's initial analysis of the case is that it will be decided summarily as a

matter of law, a right to factual development should remain before such drastic remedy of striking pleadings.

Likewise, Plaintiff requires that this Honorable Court rely on *his facts* to argue that other affirmative defenses are insufficient. For example, Defendant has plead the affirmative defenses of lack of standing and bona fide error per 15 USC 1692k(c). (See Defendant's Affirmative Defense #6 and 8). In both cases, Plaintiff demands that the defenses be struck based on his unilaterally developed facts. Plaintiff reasons that "lack of standing" could never possibly be an issue in this case because the Court has held a Plaintiff that is not a consumer still has standing. For this, Plaintiff relies on *Montgomery v Huntington Bank*, 346 F.3d 693 (2003). A simple reading of *Montgomery* shows that the Court was addressing one facet of the issue of standing. In *Montgomery*, an individual who possessed an automobile (Montgomery) but did not enter into the loan agreement for the purchase of the vehicle sought relief under the FDCPA. The Court held that the relevant FDCPA section applied to "any person" who was abused in connection with debt collection. The Court further held that, even if Plaintiff were not a consumer, he would still have to be found to be "an aggrieved party" under the FDCPA section. There is no discussion of the striking of pleadings and or the availability of the affirmative defense to parties - or any of the facts germane to the communication in this matter.

Plaintiff has alleged violations of 15 USC §1692. Plaintiff argues that both defenses are not valid issues because he says they are not. In fact, it is unknown absent factual development whether there remains factual scenarios regarding these defenses. Plaintiff simply presents his facts as the only

possible facts in summary fashion.

Plaintiff further demands that the Court strike affirmative defenses #16 venue and #13 practice of law based on Plaintiff's facts. According to Plaintiff, these issues could not be resolved without Court action. However, Plaintiff has failed to comply with LR 7.1 because Plaintiff's counsel has refused to discuss the case in anything other than an argumentative fashion - including simply demanding concurrence under threat of motion - well outside the spirit and letter of LR 7.1 - which requires that the movant use "reasonable efforts" and "explain the nature of the motion and its legal basis". See LR 7.1(a)(1) and (2).

More troubling, Plaintiff demands that the Court strike several of Defendant's Affirmative Defenses for reason that Defendant has "admittedly failed to conduct any investigation into the truth of the facts alleged in the Complaint or affirmative defenses." (See Plaintiff's Motion, pages #1, 4, 6, 9, 11, 12). Plaintiff's statement is a dangerous misquote and borders on misleading the Court. For the proposition that Defendant has "admitted" not investigating this matter, Plaintiff cites paragraph 17 of Defendant's Affirmative Defenses which states:

"DEFENDANT HEREBY GIVES NOTICE TO PLAINTIFF THAT IT LACKS SUFFICIENT KNOWLEDGE OR INFORMATION TO FORM A BELIEF AS TO THE TRUTH OR FALSITY OF CERTAIN OF THE ALLEGATIONS CONTAINED IN THE COMPLAINT. UNTIL DEFENDANT AVAILS ITSELF OF THE RIGHT OF DISCOVERY, THEY CANNOT DETERMINE WHETHER THE ABOVE STATED AFFIRMATIVE DEFENSES, OR OTHERS, WILL BE ASSERTED AT TRIAL. THESE DEFENSES, HOWEVER, ARE ASSERTED IN THEIR ANSWER AND AFFIRMATIVE DEFENSES IN ORDER TO PRESERVE DEFENDANTS RIGHT TO ASSET THE AFFIRMATIVE DEFENSES AT TRIAL AND TO GIVE PLAINTIFF NOTICE OF DEFENDANTS INTENTION TO ASSERT THOSE DEFENSES AND TO AVOID WAIVER OF ANY DEFENSE."

Clearly, Rule 8 allows a responding party to place its adversary on notice that it "lacks knowledge or information" sufficient to form a belief. See Rule 8(b). For Plaintiff to *repeatedly* inform the Court that Defendant has admitted to Plaintiff that it has not investigated the matter in violation of Rule 11 based

on the foregoing is troublesome, indeed. Defendant leaves the Court to its discretion on this issue. Regardless, lacking sufficient information it is not grounds to strike a party's pleadings as contended by Plaintiff.

In fact, Defendant has fully and completely complied with all Rules regarding pleading, and has provided affirmative defense 17 in the spirit of Rule 8(c) which requires that a party divulge all matters constituting a possible avoidance - Plaintiff's demand that it be struck should not be resorted to because is not "required for the purposes of justice". *See Brown & Williamson v United States*.

Likewise, justice does not require that affirmative defense #1, #7 and #18 be struck. In fact, Plaintiff's demand regarding these paragraphs is superfluous and frivolous. The case is in the initial stages. Defendant has simply given notice to Plaintiff of the possibility of amendment during the ongoing litigation, nature of the claim, and/or of the possibility of seeking relief under Rule 12(b). Plaintiff's motion demanding that these simple "notice" defenses be struck will not serve any purpose in advancing the matter, and certainly do not rise to the level of requiring a "drastic remedy to be resorted to only when required for the purposes of justice". The defenses will be undoubtedly be resolved long before trial.

Plaintiff has alleged violation of state laws and therefore several affirmative defenses have relevance beyond the FDCA. For example, Plaintiff demands that the Court strike Defendant's Affirmative Defense #11 and #3 regarding mitigation and the fact that Plaintiff has not suffered any damages as a result of acts or admissions of the Defendant. Damages and mitigation are viable defenses which may be relevant and utilized after a sufficient factual development under the Court Rules.

WHEREFORE, Defendant Mary Jane M. Elliott PC respectfully requests that this Honorable Court dismiss the Motion, and award costs and attorneys fees so wrongfully incurred in defense of this frivolous motion.

Respectfully submitted,

s/Daniel Manion

Mary Jane M. Elliott PC

Daniel Manion P49904

24300 Karim Blvd.

Novi, MI 48375

(248) 306-2000

Dated: September 21, 2007

EXHIBIT

1

MARY JANE M. ELLIOTT P.C.

Attorneys & Counselors
24300 Karim Blvd., Novi MI 48375

STATEMENT DATE: March 15, 2007

OFFER TO SETTLE

CREDITOR: GE MONEY BANK
ORIGINAL VENDOR: JC PENNEY
ACCOUNT No. 546680100
OUR FILE No. N7103922

ADDRESSEE

FRANK GLOVER

MAKE CHECKS PAYABLE AND MAIL TO:

Mary Jane M. Elliott P.C.
24300 Karim Blvd
Novi MI 48375

Telephone (248) 306-2000

Facsimile: (248) 306-2014

Hours: 8 A.M. - 8 P.M. MON - THURS,

8 A.M. - 5 PM FRIDAY

8 A.M. - 12 P.M. SATURDAY

*****25% OFF*****

YOUR OUTSTANDING GE MONEY BANK BALANCE

TO ACCEPT THIS OFFER YOU MUST CALL THIS OFFICE WITHIN 21 DAYS OF THE DATE OF THIS LETTER TO OBTAIN A SETTLEMENT AMOUNT.

Upon receipt of your timely settlement, in the form of money order, cashier check or certified funds, or after 20 days from receipt of personal check, we will do the following:

1. Advise our client that we have received the settlement so that they can update their reports (if any) to the credit reporting agency to indicate that the debt is settled in full.
2. Send you a settled in full letter for your file.
3. If suit has been filed against you but no judgment filed, we will dismiss the lawsuit.
4. If judgment has been entered, we will prepare and file a Satisfaction of Judgment and send you a court stamped copy for your records.

Please be advised that this settlement offer is not intended as a stay of current legal activity. If you wish to set up partial payment arrangements on your account, please contact this office immediately.

If at any time this office receives funds held under the state income tax credit/refund for the current year, that also will be considered as payment in addition to the settlement payment. Please contact this office without delay if you have any questions concerning this offer. If we do not receive your settlement amount by the acceptance date, this offer is revoked.

Sincerely,
Mary Jane M. Elliott

THIS IS AN ATTEMPT TO COLLECT A DEBT
AND ANY INFORMATION OBTAINED WILL BE
USED FOR THAT PURPOSE

MoneyGram

WESTERN
UNION